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No. 87-640

In the Supreme Court of the United States

OCTOBER TERM, 1987

E. C. ERNST, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a claimant worked in the same employment during substantially the whole of the year preceding his work-related injury for purposes of determining the claimant's "average weekly wage," the base for calculating his disability compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. III) 901 *et seq.*

2. Whether particular cash payments to a claimant above his base salary were properly included in calculating his "average weekly wage."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported. The decision and order of the Benefits Review Board (Pet. App. 7a-13a) is reported at 18 Ben. Rev. Bd. Serv. (MB) 158. The decision and order of the administrative law judge (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The version of the District of Columbia Workmen's Compensation Act (DCWCA) at issue in this case, ch.

612, §§ 1-2, 45 Stat. 600, formerly codified at D.C. Code Ann. §§ 36-501 to 36-502 (1973), extended the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. (& Supp. III) 901 *et seq.*, to all employees in the District of Columbia for work-related injuries occurring on or before July 26, 1982.[1] The LHWCA provides injured workers with guaranteed workers' compensation for work-related injuries.[2]

Disability benefits payable to an injured employee under the LHWCA and the DCWCA are based upon an employee's "average weekly wage." Thus, compensation for temporary total disability is set at "66⅔ per centum of the [employee's] average weekly wages." 33 U.S.C. 908(b). An employee's "average weekly wage" is computed according to one of three alternative methods. "If the injured employee * * * worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury," Section 10(a) of the Act provides that the employee's average weekly wage is based upon his actual earnings during the previous year.

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[1] The District of Columbia has since enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1987), pursuant to "home rule" authority granted to the District by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774. The new law became effective on July 26, 1982, for injuries occurring after that date; employers continue to be liable under the earlier DCWCA for injuries that occurred prior to that date. See 20 C.F.R. 701.101(b).

[2] The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (& Supp. III) 901 *et seq.*). The provisions of the unamended version of the LHWCA continue to apply to claims arising out of injuries that occurred before the effective date of the 1982 District of Columbia law referred to above (note 1). *Keener* v. *Washington Metro. Area Transit Auth.*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987).

33 U.S.C. 910(a).[3] In contrast, the average weekly wage of an employee who has not worked in the same employment for substantially the whole of the year preceding the injury is, under Section 10(b), derived by looking to the wages of employees "of the same class" who worked for substantially the whole year preceding the injury in the same or similar employment in the same or a neighboring place. 33 U.S.C. 910(b). Finally, where neither Section 10(a) nor 10(b) can "reasonably and fairly be applied," Section 10(c) provides that the average weekly wage will be derived from "the annual earning capacity of the" individual, taking into account such considerations as the individual's previous earnings in the employment in which he was injured, the earnings of other employees engaged in similar work in the locality, and other employment of the individual. 33 U.S.C. 910(c).

2. Petitioner E.C. Ernst, Inc. (Ernst), is an electrical contractor incorporated under the laws of the District of Columbia (Pet. 3). Petitioner Travelers Insurance Co. is Ernst's worker's compensation liability carrier (*ibid.*). Respondent John Paul Mulcare, Jr., fell and was injured on April 7, 1979, while working in the District of Columbia as an electrician in the employ of Ernst. Mulcare was temporarily totally disabled as the result of his injuries (Pet. App. 15a-16a).

During the year before his injury, Mulcare had been employed by Ernst between May 1978 and June 22, 1978, and between December 1978 and April 1979. While employed by Ernst, Mulcare received union scale wages, which at the time of his injury were $11.70 per hour, or a base rate of $468 per 40-hour week (Pet. App. 16a).

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[3] Section 10(a), like Section 10(b) and (c), 33 U.S.C. 910(b) and (c), provides for the calculation of "average annual earnings." This figure becomes the "average weekly wage" when divided by 52, as set forth in 33 U.S.C. (Supp. III) 910(d).

Between June 22, 1978, and December 1978, Mulcare had been employed as an electrician in Saudi Arabia pursuant to a six-month contract with E.C. Ernst, International (Ernst, International), a wholly owned subsidiary of Ernst (*id.* at 16a, 18a). Under the terms of his employment contract with Ernst, International, Mulcare was paid a base salary of $625 per week, a food allowance of approximately $500 per month, a 15% overseas increment, a 10% contract completion bonus, and other benefits (including overtime for work on Fridays and during the Ramidan holiday, and a two-week vacation with pay) (*ibid.*).

3. a. After Mulcare's injury, petitioners began paying him compensation benefits for his temporary total disability, calculated pursuant to Section 10(b) of the Act and based on the union scale wages earned by journeyman electricians in the Washington, D.C., area, during the year before Mulcare's injury (Pet. App. 16a). Mulcare then filed this claim challenging the compensation rate, asserting that, because he had worked at the same type of employment throughout the year preceding his injury, his "average weekly wage" should be determined by reference to Section 10(a) and, thus, should be based on his actual wages during the year preceding his injury, including the wages he received for work in Saudi Arabia (Pet. App. 15a).

The administrative law judge (ALJ) found that "the nature of [Mulcare's] employment [in Saudi Arabia and the District of Columbia]—that is, the skills, knowledge and experience utilized * * *—[was] not merely 'highly comparable' but unquestionably the same" (Pet. App. 20a). The ALJ based this finding upon Mulcare's testimony that while employed at Ernst he "was essentially a journeyman electrician who had worked as a foreman and subforeman performing * * * electrical construction work," whereas "[f]or Ernst Int. [he] was a 'working foreman' doing essentially the same work" (*ibid.*). The

ALJ also found that Mulcare's wages and benefits from Ernst, International, represented an earning capacity that he "had achieved" based upon sacrifices he had made while working in Saudi Arabia, and that were derived from the same employment in which he was working at the time of injury. Because the ALJ accordingly found that Mulcare had been working in the same employment for substantially the whole year preceding the accident, he concluded that Mulcare's disability compensation should, pursuant to Section 10(a) of the Act, be based upon his actual wages during that year (Pet. App. 21a-22a).[4]

b. The Benefits Review Board affirmed, holding that the ALJ's determination of Mulcare's average weekly wage under Section 10(a) was supported by substantial evidence that Mulcare's skills, knowledge, and experience in his Saudi Arabia and District of Columbia positions were the same (Pet. App. 8a, 11a). The Board rejected petitioners' argument that the difference in geographic location between the District of Columbia and Saudia Arabia jobs established that they were dissimilar, noting that Section 10(a), unlike Section 10(b), contains "no locality requirement" (*ibid.*).

The Board also found reasonable the ALJ's finding that the additional compensation received by Mulcare in Saudi Arabia had been compensation for sacrifices arising out of foreign employment (Pet. App. 12a). The Board therefore rejected petitioners' argument that Section 10(a) could not "reasonably or fairly be applied" in this instance, and that the average weekly wages should therefore be determined under Section 10(c) (Pet. App. 12a-13a).

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[4] Wages calculated at union scale produced an average weekly wage of $468 per week, yielding a compensation rate of $312.15 per week (Pet. App. 15a). Under Section 10(a), Mulcare's average weekly wage was $1,097.54, yielding a compensation rate at the statutory maximum of $396.78 per week (Pet. App. 22a).

c. The court of appeals affirmed in an unpublished order and opinion (Pet. App. 1a-6a). The court agreed that substantial evidence supported the finding that Mulcare's employment "did not change materially" during the year preceding his injury (*id.* at 4a). The court also found substantial evidence supporting the finding that the extra pay received by Mulcare in Saudi Arabia "compensate[d] [him] for the hardship and inconvenience of working" in a foreign location, and had not been paid "because [the employment] required additional skills or training" (*id.* at 5a). And the court rejected petitioners' arguments that because Mulcare worked for a different employer and outside the country during the relevant period, use of Section 10(a)'s method was an inappropriate formula for determining his average weekly wage (Pet. App. 4a).

The court of appeals also held that the payments Mulcare received from Ernst, International, above his $650 weekly base salary were "wages" under this Court's decision in *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624 (1983), rather than "fringe benefits" that should be excluded in determining a wage rate under the LHWCA. The court concluded that these additional payments constituted wages because they were paid directly to Mulcare as consideration for work he performed and represented " 'real economic gain' " to him. Pet. App. 5a-6a (quoting 2 A. Larson, *Larson's Workmen's Compensation Law* § 60.12(a) (1986)).

ARGUMENT

The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or another court of appeals. Review of petitioners' contentions – which primarily involve challenges to factual findings made by the ALJ and affirmed by the Benefits Review

Board and the court of appeals—is therefore not warranted.[5]

1. The administrative law judge found that Mulcare's employment in Saudi Arabia and the District of Columbia had been "unquestionably the same" (Pet. App. 20a). The Benefits Review Board and the court of appeals concluded that this finding was supported by substantial evidence. In contending (see Pet. 10-11) that Mulcare's employment in Saudi Arabia was not the same as his employment in the District of Columbia, petitioners are essentially challenging this factual determination. It is clear, however, that Mulcare's testimony regarding his duties in the two jobs (Pet. App. 17a) provides substantial evidence supporting the ALJ's finding, and petitioners' attack on that finding plainly does not warrant this Court's attention.[6]

Petitioners also erroneously assert (Pet. 16-19) the existence of a conflict among the circuits by pointing to court of appeals' decisions applying formulas other than that specified in Section 10(a). In those cases, however, Section 10(a) was not the appropriate measure of wages because the claimants' employment was discontinuous, intermittent or seasonal in character, or of too short a dura-

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[5] We note that, even if the unpublished order below could be said to have settled the meaning of the DCWCA, that decision would have no continuing effect. The enactment of a new workers' compensation law in the District of Columbia (see note 1, *supra)* changed the formula on which a claimant's average weekly wage is computed. See D.C. Code Ann. § 36-311 (1981 & Supp. 1987) ("weekly wage" computed on the basis of wages at the time of injury).

[6] Petitioners assert (Pet. 11), without any supporting authority, that employment outside the United States cannot be the same as Mulcare's domestic employment for purposes of Section 10(a). As the court of appeals recognized (Pet. App. 4a-5a), this contention is inconsistent with the plain language of the statute. In contrast to Section 10(b), which refers to wages of employees doing similar work "in the same or a neighboring place," Section 10(a) contains no requirement that a claimant's work in the same employment be performed in one location.

tion to cover "substantially the whole of the year immediately preceding his injury." See *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d 752, 753 (7th Cir. 1979) (Section 10(c) applies where work discontinuous and intermittent); *Johnson* v. *Britton*, 290 F.2d 355, 357 (D.C. Cir. 1961) (claimant worked 180 days in year, a "typical year in the construction industry"); *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d 979, 980 (4th Cir. 1949) (Section 10(b) was applied because, although the employment itself was continuous, claimant had commenced working in that employment only two days before his injury); *Marshall* v. *Andrew F. Mahony Co.*, 56 F.2d 74, 77 (9th Cir. 1932) (Section 10(a) applies where work continuous). See S. Rep. 1315, 80th Cong., 2d Sess. 6 (1948) ("[S]ubsection (c) applies to seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek.").[7] Here, in contrast, the ALJ explicitly found that Mulcare worked in the same employment throughout the year preceding his injury—findings that make it clear that Mulcare's employment was continuous and full time. See Pet. App. 22a n.6. The decisions cited by petitioners are therefore inapposite.[8]

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[7] *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 698 F.2d 743 (5th Cir. 1983), said by petitioners to be in conflict with the decision below (Pet. 16), was vacated by the en banc Fifth Circuit. 723 F.2d 399, cert. denied, 469 U.S. 818 (1984). In any event, even the panel decision in that case did not conflict with the holding of the court of appeals here. The panel in *Newpark Shipbuilding* affirmed an administrative law judge's findings that there "had [been] a complete change * * * of * * * employment" when the claimant abandoned his work as an independent contractor to become an hourly paid welder. 698 F.2d at 749.

[8] Petitioners' contention that the ruling below is "shockingly inequitable" because it does not "fairly reflect[] [Mulcare's] earning capacity" is without merit (Pet. 10). The Benefits Review Board noted that Mulcare had begun making preliminary arrangements for returning

2. There is no merit in petitioners' challenge (Pet. 20-27) to the court of appeals' ruling that payments to Mulcare in excess of his weekly base rate were properly considered by the ALJ in calculating Mulcare's average weekly wage. Petitioner asserts that this ruling conflicts with this Court's decision in *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624 (1983). In *Morrison-Knudsen*, however, this Court held only that employer contributions to union trust funds for health and welfare, pension, and training programs should not be deemed "wages" for purposes of computing compensation benefits under Section 2(13) of the LHWCA, 33 U.S.C. 902(13),[9] because the present value of such contributions cannot easily be converted to a cash equivalent and because the interest of employees in such contributions are "speculative" (461 U.S. at 630-631). At the same time, the Court recognized that "benefits with a present value that can be readily converted into a cash equivalent on the basis of their market values" are appropriately deemed wages (*id.* at 630). As the court below held (Pet. App. 5a-6a), the challenged payments here (an overseas adjustment, completion

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to Saudi Arabia, although he had not yet applied for jobs in that country at the time of his injury (Pet. App. 9a). Thus, the court of appeals correctly concluded that, "[b]ecause of Mulcare's actual work history during the year preceding his injury, as well as his employment intentions for the future, the section 10(a) formula can be reasonably applied to determine the rate of compensation to which he is entitled" (*id.* at 5a). In any event, petitioners' allegations of inequity are exaggerated. The statutory cap on compensation diminished the effect of Mulcare's Saudi Arabian wages on his benefits under the Act by more than $300 per week. As a result, inclusion of those wages increased his compensation under the DCWCA by less than $85 per week. See Pet. App. 15a.

[9] The 1984 amendment to Section 2(13) of the LHWCA codifies the holding in *Morrison-Knudsen*. Pub. L. No. 98-426, § 2(c), 98 Stat. 1639. See note 2, *supra*.

bonus, food allowance, payments for unused vacation time, and overtime for Saudi Arabian holidays) plainly were wages under that test: they were paid out directly to Mulcare and constituted a real economic gain to him that was provided as consideration for his services. The payments accordingly were properly included in determining his average weekly wage.

In any event, no other court of appeals has differed with the interpretation of *Morrison-Knudsen* offered by the court below. And, as petitioners acknowledge (Pet. 23), this issue is "of no consequence" in determining Mulcare's temporary total disability payment, the only payment to which he is currently entitled: Mulcare would receive the statutory maximum in compensation (see 33 U.S.C. 906) whether or not the challenged items are included in the average weekly wage. Review therefore is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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